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**Protecting Indigenous Identities: Struggles & Strategies
Under International & Comparative Law**

**NATIVE HAWAIIANS AND THE LAW: STRUGGLING WITH
THE HE'E**

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I've been grappling the last few days with what to say as a commentary to Judge Williams' speech, not knowing the content of his talk ahead of time. Fortunately, I did have an opportunity to meet with him yesterday and he told me that he was generally going to discuss whether the law can be used to protect the interests of native peoples, how well it can do that, and the idea of incremental changes in the law – changes that one can see and are somewhat predictable – versus paradigm shifts.

Last night, after listening to Professor Tsosie's keynote speech, I went home and thought about what I could add to the discussion. As I sometimes do, I turned to '*Ōlelo No'eau*,¹ a book of Hawaiian proverbs and poetical sayings, to see if there was something about the law or a related topic that might give me an idea on how to approach this commentary. After an hour or so of searching, I found nothing, so I closed the book. I had a restless sleep, waking up in the middle of the night to again think about what I might say. I woke up this morning and I decided to try '*Ōlelo No'eau* one more time. I opened it, pointed my finger, and ended up not with a proverb, but

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¹ MARY KAWENA PUKUI, '*ŌLELO NO'EAU, HAWAIIAN PROVERBS & POETICAL SAYINGS* (1983).

with a wood block print of a He'e, an octopus. I laughed and said to myself, "That's exactly it, what better metaphor for the law then the He'e, the octopus."

What attributes of the He'e are noted in Hawaiian proverbs?

The He'e is slippery, crafty, and dishonest:

*He waha kou o ka he 'e.*²
Yours is the mouth of an octopus.
You are a liar.

The He'e is many faceted and complicated:

*Ka i'a mana nui.*³
The fish of many divided parts.

The He'e changes color and camouflages itself. It can melt into the background; it is malleable. And then of course, the He'e is famous for its ink, with which it protects itself and obfuscates what should be clear and apparent.⁴

What has been our experience as Native Hawaiians with this He'e? In this I echo Judge Williams' assessment of the Māori experience – it has not been positive so far.

We need only to look to the Māhele of 1848, a process advocated by western business interests and legal advisors to Kamehameha III, which converted the Hawaiian communal land system into a private-property fee ownership system. In the Māhele process, only twenty-six percent of adult Hawaiian males received land. The common Hawaiian people received less than 30,000 acres,

² *Id.* at 104, # 969.

³ *Id.* at 149, # 1369.

⁴ Illustrating this point is another Hawaiian proverb:

Pupuhi ka he'e o kai uli.
The octopus of the deep spews its ink.
The octopus escapes from its foes by spewing its ink and
darkening the waters.

Id. at 301, # 2751.

less than one percent of Hawai'i's four million acres of land.⁵ Subsequent laws after the Māhele allowed land ownership by non-natives,⁶ adopted the adverse possession doctrine,⁷ and permitted non-judicial foreclosure of mortgages,⁸ thereby leading to even greater loss of lands by chiefs and commoners alike.

This negative experience with the law continued and, indeed, Hawaiian suspicion of the law was validated in 1893 with the overthrow of the Hawaiian Kingdom by western businessmen assisted by U.S. diplomats and troops. Hawaiians, believing that the U.S. would honor international legal principles and its own laws sought to prevent annexation and submitted petitions to the U.S. Congress – over 21,000 signatures – protesting annexation.⁹ In a stunning move that went against all American constitutional precedent, when Congress annexed Hawai'i in 1898, it did so not through a treaty, which would have required approval by a two-thirds majority of the Senate, but rather by a joint resolution that required only a simple majority in each house.¹⁰ As acknowledged by Congress in 1993 through the Apology Resolution,¹¹ although Hawai'i was annexed to

⁵ Neil M. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 856 (1975).

⁶ Act of July 10, 1850, *reprinted in* 2 Rev. Laws of Hawaii 1925, at 2233-34.

⁷ Act 22, Act of July 18, 1870, "An Act Limiting the Time Within Which Actions May be Brought to Recover Possession of Land."

⁸ Act 33, Act of July 18, 1874, "Act to Provide for the Sale of Mortgaged Property Without Suit and Decree of Sale." See ROBERT STAUFFER, *KAHANA: HOW THE LAND WAS LOST*, 92-107 (2004) for a discussion of the act.

⁹ Noenoe K. Silva, *Kanaka Maoli Resistance to Annexation in KŪ'E: THE HUI ALOHA 'ĀINA ANTI-ANNEXATION PETITIONS 1897-1898*, 1, 39 (Nālani Minton & Noenoe K. Silva eds., 1998).

¹⁰ The U.S. Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. Hawai'i was annexed by a joint resolution of Congress. Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750. See 12 Op. Off. Legal Counsel 238, 251-52 (1988) for a discussion of the annexation process.

¹¹ To Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii and to Offer an Apology to Native Hawaiians

the United States in 1898, the Hawaiian people never directly relinquished their claim to inherent sovereignty or over their national lands. This was the experience of Kānaka Maoli in our early days of contact with western law.

Hawaiians in modern times also have found little real justice through legal processes. Continuing disputes over monies due under State law for Native Hawaiian programs,¹² the dismal track-record of the Hawaiian Homes program established by a 1921 Congressional Act to provide Hawaiians with lands, and ongoing clashes between Hawaiians and private landowners seeking to prohibit access to traditional cultural sites and gathering rights have only reinforced the view that the law cannot be trusted. It is a He‘e – slippery, shift, and devious.

And perhaps one small indication – something from my personal experience – that this He‘e has been slippery, that it obfuscates, that you cannot trust it, is that in 1991, when the State established a process for beneficiaries of the Hawaiian Homelands trust to file damages claims,¹³ only about a quarter of those who could file claims did so. In an ironic twist not lost on the Native Hawaiian community, the State subsequently dismantled the claims process without paying any damages when it became clear that millions of dollars would be necessary to address even the few claims that had been filed.¹⁴ So this has been our relationship with the He‘e - one of distrust, of betrayal, of slipperiness, of laws that change just when it appears that Hawaiians will benefit. Kānaka Maoli and Māori, unfortunately, share this common history.

But, I don't want to malign the He‘e too much because Hawaiians also recognize the many positive attributes of the He‘e. The liver of the He‘e is mashed by fishermen and used as bait for other fish. When fish are not biting, the fishermen take the heart of

on behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

¹² See, e.g., *Trustees of OHA v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987); *OHA v. State*, 96 Hawai‘i 388, 31 P.3d 901 (2001).

¹³ Act 323, 1991 Haw. Sess. Laws, codified as HAW. REV. STAT. ch. 674.

¹⁴ See generally, HAWAIIAN HOME LANDS TRUST INDIVIDUAL CLAIMS REVIEW PANEL, FINAL REPORT TO THE GOVERNOR AND THE 2000 HAWAII LEGISLATURE.

the He'e and mash it up and mix it with poi - and it is very 'ono.¹⁵ And we all know that the 'ono meat of the He'e mixed with lū'au makes one of those tasty delicacies we like to eat. So the He'e has that slippery aspect, that part we can't get our hands around, that part we cannot hold. But it also has redeeming qualities that nourish us and that we value.

In his talk, Judge Williams discussed the incremental nature of change in the law. And, I think, this morning, when Davianna McGregor and the panel members discussed the evolution of the law in relation to traditional and customary rights of Hawaiians,¹⁶ you could see incremental changes over the course of almost thirty years. From 1978, with the passage of the constitutional amendment recognizing the traditional and customary rights of Native Hawaiians, to 1982, when the *Kalipi*¹⁷ decision came out validating those rights, although interpreting them more narrowly than we had hoped.

The next case – the 1992 *Pele Defense Fund*¹⁸ case – extended those rights beyond the ahupua'a¹⁹ if it could be shown that traditionally the right had been exercised beyond the ahupua'a boundary. Subsequent cases, most notably the PASH²⁰ decision, advanced and refined the law to the point where the latest cases have held that government agencies, in granting permits for development, must take into consideration the impact on Native Hawaiian traditional and customary rights. The cases make clear that the agency must make an independent assessment and identify the

¹⁵ “Delicious, tasty, savory[.]” MARY KAWENA PUKUI & SAMUEL ELBERT, HAWAIIAN DICTIONARY 289 (rev. ed. 1986).

¹⁶ The panel, moderated by Professor Davianna McGregor of the University of Hawai'i Department of Ethnic Studies, focused on environmental versus development interests and the effects on Hawai'i's indigenous peoples.

¹⁷ *Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982).

¹⁸ *Pele Defense Fund v. Paty*, 79 Hawai'i 578, 836 P.2d 1247 (1992).

¹⁹ “Land division usually extending from uplands to the sea[.]” PUKUI & ELBERT, *supra* note 15, at 9.

²⁰ *Pub. Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 903 P.2d 1246 (1995).

feasible action, if any, to be taken to reasonably protect Native Hawaiian rights.²¹

So illustrating Judge William's point, over the course of this thirty-year period there has been an incremental change in the law, in this instance largely for the good. But during that time of change, there were many instances when the Native Hawaiian community had to rally in order to make sure that those rights were continued and preserved. There were efforts in the State legislature to restrict traditional and customary rights, to define them, and possibly to define them out of existence.²²

Judge Williams also discussed the concept of a paradigm shift – an unexpected and unplanned for shift in the law that doesn't arrive out of doctrinal discourse but out of social movements external to the law. Hawaiians also have experienced a paradigm shift in the law, but it has been a negative one – one with which we are still dealing. That shift is reflected in the United States Supreme Court's decision in *Rice v. Cayetano*.²³

At the time that the Office of Hawaiian Affairs (OHA) was created by the 1978 Constitutional Convention, it was an accepted doctrine that the people of the State had the authority to create such an entity. The U.S. Supreme Court had issued the *Morton v. Mancari*²⁴ decision a mere four years earlier. It seemed that the interests of native people were finally being recognized and that the State of Hawai'i, in its efforts to address past wrongs, could use the *Mancari* precedent in establishing OHA. Those of us who witnessed the creation of OHA viewed it as a first step. It was to be the first step that would lead, we thought, to federal recognition.

²¹ *Ka Pa'akai O Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 39, 7 P.3d 1068, 1076 (2000).

²² See D. Kapua Sproat, Comment: *The Backlash Against PASH: Legislative Attempts To Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321, for a discussion on attempts to limit traditional and customary rights.

²³ *Rice v. Cayetano*, 528 U.S. 495 (2000), held that state laws restricting the electorate for Office of Hawaiian Affairs' trustees to citizens of Hawaiian ancestry violated the Fifteenth Amendment to the U.S. Constitution.

²⁴ *Morton v. Mancari*, 417 U.S. 535 (1974), upheld the Bureau of Indian Affairs' Indian hiring preference to a Fifth Amendment racial discrimination challenge by applying rational basis review and finding that the preference was reasonable and rationally designed to further Indian self-government.

Let me give just a bit of context to the whole idea of federal recognition. Remember that OHA was created in a time where self-determination for Native Americans was a relatively new federal policy. The idea of a government-to-government relationship with the U.S., a new type of relationship, was intriguing. More than intriguing, it was compelling. The old phrase “domestic dependent nations,” describing the relationship between native tribes and the federal government, appeared to be changing. The “domestic, dependent” aspect of the relationship was giving way to the “nation” aspect of the phrase. At least that was what we here in Hawai‘i perceived was happening on the U.S. continent with the tribes. We believed that we too were moving toward nationhood. That was the vision. We thought we had time, time to educate, time to organize, time to build consensus.

But it didn’t happen. For various reasons, OHA’s initial promise was not fulfilled. One primary reason, of course, was that OHA necessarily spent its first ten to fifteen years of existence trying to wrest from the State its share of ceded lands revenues.²⁵ So, the promise, the idea that we would be moving towards federal recognition, towards a governmental relationship with the United States, was compelling at the time but, ultimately, it failed. Indeed, there was little agreement amongst Hawaiians that federal recognition was necessary or desirable.

This was our situation at the time the *Rice* case was decided. And where once federal recognition seemed like a choice – something we could consider and move toward if we chose to, it now appears to be a necessity if we are to survive. With the *Rice* decision there is a new sense of urgency. But this sense of urgency is tinged with apprehension and fear – fear that if we do not receive federal recognition, the programs and laws that benefit Kānaka Maoli will no longer exist.

Last night, in discussing federal recognition with Professor Tsosie, she commented that she had not met anyone in Hawai‘i that actually viewed the federal recognition bill, the Akaka Bill,²⁶ as a

²⁵ See, e.g., *Trustees of OHA v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987).

²⁶ The Native Hawaiian Government Reorganization Act of 2005, S. 147 and H.R. 309, currently pending in Congress, is commonly known as the Akaka Bill, after Sen. Daniel K. Akaka its chief sponsor in the Senate.

positive choice; instead it seemed people felt backed into a corner. And she cautioned that we consider that very closely - you do not want to act when you feel backed into a corner.

Ironically, from Professor Tsosie's keynote address last night, it seems that even if Hawaiians were to achieve federal recognition through the Akaka Bill or some other mechanism, the decisions of the U.S. Supreme Court indicate that the sovereignty of Indian nations – limited as it is – may not survive the next twenty years. Thus we may now be moving towards a status that ultimately will prove toothless and ineffectual.

With this uncertain time ahead of us, and a justifiable history of distrusting the law, what do we do with this He'e? There is another 'ōlelo no'eau about the He'e that gives us guidance:

*Ka i 'a pipili i ka lima.*²⁷

The fish that sticks to the hand.

The He'e will not go away, it is stuck to our hands and we must handle it – with its slippery nature and its many arms, with its ability to camouflage and obfuscate – and literally leave us spattered in ink. We must handle it carefully, but as indigenous peoples, we must handle it.

I conclude my remarks with an excerpt from Professor Jonathon Osorio's article in the Hawaiian Journal of Law and Politics entitled "*Ku'e and Ku'oko'a (Resistance and Independence): History, Law, and Other Faiths.*"²⁸ In that article, Professor Osorio compares two initiatives advocating different approaches to sovereignty – the Council of Regency of the Kingdom of Hawai'i and Ka Lāhui Hawai'i. Although the approach of each organization is very different, he concludes that some common ground may exist after all. It is a rather long excerpt, but I thought it was very insightful and relevant to this discussion of how indigenous peoples interact with the law:

²⁷ PUKUI, *supra* note 1, at 150, # 1379.

²⁸ Jonathon Kamakawiwo'ole Osorio, *Ku'e and Ku'oko'a (Resistance and Independence): History, Law, and Other Faiths*, 1 HAWAIIAN JOURNAL OF LAW AND POLITICS 92, at [http://www2.hawaii.edu/~hslp/journal/vol1/Osorio_Article_\(HJLP\).pdf](http://www2.hawaii.edu/~hslp/journal/vol1/Osorio_Article_(HJLP).pdf).

Certainly all the major sovereignty initiatives have proclaimed a faith in law and the electoral process. This, in itself, is a telling reminder that our world has changed, and significantly. One crucial aspect of law is that it enables contending and competing groups within a society to coexist, compensating for the lack of faith between them by requiring that they place their faith in law instead. Even if law may betray the weak and helpless more often than it does the powerful, it may be the only platform from which one group, no matter how small, may fearlessly stake out its right to exist and to endure.

However, placing faith in law requires that we acknowledge a layer of authority other than custom and tradition. This is an ideological razor's edge for nationalists who see sovereignty as a protector of "the Hawaiian culture." Law involves compromise - and tradition can be so uncompromising. Nevertheless, Hawaiians have already made the concession to trust in law. Perhaps that should be the first thing on which we can agree. We will certainly dispute many other things: our read of history, the importance we attach to ancestry, how we will live, and how we will treat Americans and foreigners. Because we do not see these things the same way now, let us fashion laws that will enable us to act together in spite of it all.

Among all the conversions the Kanaka Maoli accepted from America, the one that proved most unreliable was the implicit promise accompanying the introduction of western laws - that justice is possible. More than 160 years later, our willingness to drape our future onto a legal frame demonstrates profound understandings of law and history. Regardless of the fact that law has changed the Native and may have created a being that is not entirely like our ancestors, law has also been made a part of our being, adopted and adapted to our view of ourselves and the world. Our experience with colonialism makes us wise in our understanding of the limits and promise of law. We do understand the

significance of bending to its authority. In a world where other faiths are so carelessly deployed against one another, humanity itself should prefer that a genuine faith in history and law be desirable, useful, and meaningful to all. That the imperialist can convey this message as credibly as the conquered is doubtful.²⁹

So what do we do with the law, with this He‘e? As Professor Osorio sees it, Hawaiians have already made the decision to place our faith in the law. Having done so, we must also learn to handle the He‘e, to understand it, to embrace it, to change it – we must do all of those things necessary to make it our own.

²⁹ *Id.* at 112-13.